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No. ——

Supreme Court of the United States

(October Term, 1948)

Oliver Cleve Ryles,
Petitioner,

VERSUS

United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION FOR WRIT OF CERTIORARI

The petitioner, Oliver Cleve Ryles, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in that certain case therein entitled, "Oliver Cleve Ryles, Appellant, vs. United States of America, Appellee," the same being numbered 3711 therein. The judgment of that court was entered on December 29, 1948, but within thirty days thereafter, and within the time allowed by the United States Court of Appeals, the petitioner filed in that court a petition for rehearing, as permitted by the rules of that court, and such petition for rehearing was denied by the Court of Appeals on January 27, 1948. The decision has not yet been reported, but is shown in the printed transcript of record filed herewith.

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit is set forth in the record and is copied in the appendix to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254 of the 1948 Judicial Code (28 U. S. C., Sec. 1254), and Rule 37(b) of the Federal Rules of Criminal Procedure.

This petition for writ of certiorari is filed within thirty days after the entry of the order of the United States Court of Appeals for the Tenth Circuit denying petitioner's petition for rehearing in that court, which was filed within the time a petition for writ of certiorari could have been filed in this Court to obtain a review of the judgment entered by that court on December 29, 1948, and is, it is submitted, filed within the time allowed by Rule 37(b) of the Federal Rules of Criminal Procedure.

—*Chin Gum* v. *U. S.*, 150 Fed. (2d) 765;

Morse v. *U. S.*, 270 U. S. 151, 70 L. Ed. 518, 56 Sup. Ct. 241;

Gypsy Oil Co. v. *Escoe*, 275 U. S. 498, 72 L. Ed. 393, 48 Sup. Ct. 112;

U. S. v. *Seminole Nation*, 299 U. S. 417, 81 L. Ed. 316, 57 Sup. Ct. 283;

National Labor Relations Board v. *Mackay Radio & Tele. Co.*, 304 U. S. 33, 82 L. Ed. 1381, 58 Sup. Ct. 904.

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This petition is to obtain a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, dated December 29, 1948, and also the order of that court made on January 27, 1949, denying this petitioner's petition for rehearing in that court. This petition is made pursuant to Section 5(b) of Rule 38 of the Rules of this Court, and in particular the part thereof which indicates that a writ of certiorari may issue to a United States Court of Appeals where a United States Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court, or has decided a federal question in a way probably in conflict with applicable decisions of this Court.

QUESTIONS PRESENTED

A.

Whether in a prosecution for alleged sales of narcotics in violation of 26 U. S. C., Sec. 2554(a), where evidence developed by cross-examination of witnesses for the Government showed that the defendant (petitioner) had been wrongfully entrapped into making the alleged sales, or was susceptible to an inference of entrapment and justified submission of that issue to the jury, the error of the trial court in deciding the issue of entrapment against the accused (petitioner) as a matter of law was such a plain error as should be noticed under Rule 52(b) of the Federal Rules of Criminal Procedure, notwithstanding the fact that exception was not taken to the erroneous instruction in compliance with Rule 30 of the Federal Rules of Criminal Procedure where defendant's (petitioner's) counsel made a demurrer to the Government's evidence

or a motion for acquittal as provided by Rule 29 of the Federal Rules of Criminal Procedure, on the ground that the Government's evidence showed that if the defendant had committed either offense of which he was charged, it was by reason of entrapment by agents of the Government, and whether by reason of such error in the instructions, the petitioner should have a new trial?

B.

Whether under the facts developed by cross-examination of Government's witnesses it was shown that the defendant (petitioner) had been entrapped, and whether the trial court erred in overruling the defendant's (petitioner's) demurrer to the Government's evidence or motion for acquittal?

C.

Whether the indictment under which petitioner was convicted was sufficient to charge an offense in violation of Section 2554(a) of Title 26, U. S. Code?

SUMMARY STATEMENT OF MATTERS INVOLVED

Petitioner was charged by indictment in the United States District Court for the Eastern District of Oklahoma in two counts, each attempting to charge a sale of narcotics in violation of Section 2554(a) of Title 26, U. S. Code (R. 1). The indictment charged in the first count that petitioner sold to one Darrell Herbert Brown 3/16ths of an ounce

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of deodorized tincture of opium on or about August 18, 1947, for the sum of $7.00, and in the second count that petitioner sold to Brown on or about August 20, 1947, four one-quarter grain tablets of morphine, a derivative of opium, for the sum of $9.00, and each count alleged that the alleged sale was made "not in pursuance of a written order of the said Darrell Herbert Brown upon a form prescribed and furnished by the *Collector* of Internal Revenue, and not within any of the exemptions or exceptions provided by law."

Petitioner will be referred to herein and in the brief in support of this petition as the defendant.

After a trial with a jury, verdict was returned finding the defendant guilty of each count, and the court sentenced the defendant to be confined for three years on each count, such sentences to run concurrently (R. 1-4). Petitioner appealed from the judgment and sentence to the United States Court of Appeals for the Tenth Circuit, which affirmed the judgment.

The defendant pleaded not guilty (R. 2). The verdict was returned March 17, 1948 (R. 2). The defendant filed a motion for new trial and in arrest of judgment which was overruled April 5, 1948 (R. 2, 4), and was sentenced April 26, 1948 (R. 4). He has been at liberty since then on a bond allowed by the trial judge (R. 6).

At the trial (R. 6), the Government produced four witnesses, including the said Darrell Herbert Brown (R. 16), the person to whom it was alleged defendant made the sales of narcotics, and the defendant did not introduce any evidence and demurred to the Government's evidence

(R. 27). The court overruled such demurrer or motion for acquittal (R. 27). The defendant claimed that the Government's evidence showed that if the defendant had committed either of the offenses of which he was charged, it was by reason of entrapment by Government agents (R. 27). The court, in effect, instructed the jury that the court was deciding as a matter of law that there was no entrapment, and that the only thing for the jury to decide was whether the defendant made the alleged sales to the witness, Brown (R. 30).

Petitioner contends that the evidence introduced showed that if either offense was committed it was because defendant was entrapped, and further contends that if such evidence does not conclusively show that there was such entrapment that it at least raised a jury question as to whether or not the defendant was entrapped.

The evidence showed that Darrell Herber' Brown was a paid informer who was acting as a Government agent (R. 11); that he was a narcotic addict (R. 19); that he had known the petitioner and was with him almost every day for two or three weeks; that he persuaded the defendant to make the two alleged sales of narcotics to him charged in this case (R. 22); that he insisted on it (R. 22); that if it had not been for such insistence, he never would have been able to purchase the narcotics from or through the defendant (R. 22); that as far as was known to witness, Brown, the petitioner never would have committed any offense or done anything against the law if it had not been for the activities by such witness, and the Government agent who employed Brown (R. 22). Other facts are set

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forth in the opinion of the Court of Appeals, a copy of which is attached as an appendix to this petition and in the supporting brief filed herewith.

REASONS RELIED UPON FOR ISSUANCE OF WRIT

1. The questions involved are questions of Federal law which have not been, but should be, settled by this Court. Such questions include the question of construction of Rules 30 and 52(b) of the new Federal Rules of Criminal Procedure as to whether, if the facts developed in the trial of a criminal case raised a jury question as to whether the defendant had been entrapped, the error of the trial court in deciding the issue against the defendant as one of law and not submitting it to the jury, is such a plain error under Rule 52(b) of the Federal Rules of Criminal Procedure, that the judgment of the trial court should be reversed and a new trial ordered, although the requirements of Rule 30 of the Federal Rules of Criminal Procedure in regard to exceptions to instructions were not complied with by the defendant's counsel, where the liberty of the defendant is at stake by reason of such error of the trial court.

2. The decision of the United States Court of Appeals for the Tenth Circuit in this case is probably in conflict with applicable decisions of this Court cited and discussed in the brief filed herewith as to the power and duty of an appellate court to correct a plain error in the trial of a criminal case involving the liberty of an accused, although the action of the trial court was not particularly excepted to at that time.

3. The decision of the United States Court of Appeals for the Tenth Circuit in this case is probably in conflict with prior decisions of that court (rendered before the adoption of the Federal Rules of Criminal Procedure), cited in the brief filed herewith, as to the power and duty of an appellate court to correct a plain error clearly prejudicial to the accused in the trial of a criminal case in the absence of a particular exception in the trial court, and it is important that this Court determine the correct view to be adopted under such new Rules of Criminal Procedure in regard to this matter.

SPECIFICATIONS OF ERROR

1. The Court of Appeals erred in holding that the error of the trial court in not submitting the issue of entrapment to the jury and in instructing the jury as a matter of law that there was no entrapment in the case was not a plain error for which the judgment of the trial court should be reversed.

2. The Court of Appeals erred in not reversing the judgment of the trial court because of the error of the trial court in misdirecting the jury on the law of the case and in deciding the issue of entrapment against petitioner as a matter of law, when it should have been submitted to the jury as a question of fact.

3. The Court of Appeals erred in holding that the indictment under which petitioner was convicted was sufficient to charge a violation of the statute [26 U. S. C., Sec. 2554(a)].

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4. The Court of Appeals erred in not reversing the judgment of the District Court with directions to grant petitioner, the defendant in the District Court, a new trial.

5. The Court of Appeals erred in not holding that the defendant's demurrer to the Government's evidence or motion for acquittal should have been sustained by the District Court.

6. The Court of Appeals erred in denying petitioner's petition for rehearing in that court.

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari issue out of this Court directed to the United States Court of Appeals for the Tenth Circuit, requiring that said court send to this Court a complete transcript of the record in that court in case No. 3711 therein, entitled "Oliver Cleve Ryles, Appellant, vs. United States of America, Appellee," and that the decision and judgment of said Court of Appeals be reviewed by this Honorable Court, and that the judgment of said Court of Appeals be reversed, and for such other and further relief as this Court may deem proper.

JAMES W. BOUNDS,
Hugo, Oklahoma,
Counsel for Petitioner.

Of Counsel:

TURNER M. KING,

CARLOSS WADLINGTON,
Ada, Oklahoma.

No. ——

Supreme Court of the United States
(October Term, 1948)

Oliver Cleve Ryles,
Petitioner,

VERSUS

United States of America,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Tenth Circuit in this case has not been reported but is included in the record and a copy of the same is attached to the petition for writ of certiorari and this brief in support thereof as an appendix. The District Court did not write an opinion.

II.

JURISDICTION

1. The jurisdiction of this Court is invoked under Section 1254 of the 1948 Judicial Code (28 U. S. C., Sec.

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1254), and Rule 37(b) of the Federal Rules of Criminal Procedure.

2. The petition for writ of certiorari is to obtain a review of the judgment and opinion of the Court of Appeals for the Tenth Circuit, dated December 29, 1948, and the order of that court entered on January 27, 1949, denying this petitioner's petition for rehearing in that court, such petition for rehearing having been permitted by the rules of that court, and having been filed within thirty days after the date of the entry of the judgment of that court affirming the judgment and sentence of the United States District Court for the Eastern District of Oklahoma. The petitioner submits that, inasmuch as his petition for rehearing was filed in the Court of Appeals within thirty days after the entry of the judgment of that court, and within the time a petition for a writ of certiorari to review the judgment of that court could have been filed in this Court if no petition for rehearing had been filed in the Court of Appeals, that the period of thirty days prescribed by Rule 37(b) of the Federal Rules of Criminal Procedure for filing a petition for a writ of certiorari in this Court to obtain a review of the judgment of the Court of Appeals did not commence to run until that court made and entered its order on the 27th day of January, 1949, denying such petition for rehearing.

—*Chin Gum* v. *United States*, 150 Fed. (2d) 765;
Morse v. *United States*, 270 U. S. 151, 70 L. Ed. 518, 46 Sup. Ct. 241;

Gypsy Oil Co. v. *Escoe*, 275 U. S. 498, 72 L. Ed. 393, 48 Sup. Ct. 112;

United States v. *Seminole Nation*, 299 U. S. 417, 81 L. Ed. 316, 57 Sup. Ct. 283;

National Labor Relations Board v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 82 L. Ed. 1381, 58 Sup. Ct. 904.

3. This case involves a question of construction of Rules 30 and 52(b) of the Federal Rules of Criminal Procedure, which is a question of Federal law, which has not been specifically decided by this Court, in the aspect presented by this case, and should be decided by this Court.

4. The decision of the United States Court of Appeals for the Tenth Circuit in this case insofar as it refused to reverse the judgment in the trial court because of plain error in misdirecting the jury in the discharge of its functions in the trial of the case in the District Court, such plain error adversely affecting substantial rights of this petitioner, on the ground stated in the opinion of the Court of Appeals that such court was unable to say that such error resulted in a miscarriage of justice, was probably in conflict with applicable decisions of this Court.

—*Screws* v. *United States*, 325 U. S. 91, 107, 89 L. Ed. 1495, 65 Sup. Ct. 1031;

Johnson v. *United States*, 318 U. S. 189, 87 L. Ed. 704, 63 Sup. Ct. 549;

United States v. *Atkinson*, 297 U. S. 157, 159, 80 L. Ed. 555, 56 Sup. Ct. 391;

Clyatt v. *United States*, 197 U. S. 207, 221, 49 L. Ed. 726, 25 Sup. Ct. 429;

Brasfield v. *United States*, 272 U. S. 448, 450, 71 L. Ed. 345, 47 Sup. Ct. 135;

United Brotherhood of Carpenters and Joiners of America v. *United States*, 330 U. S. 395, 412, 91 L. Ed. 973, 67 Sup. Ct. 775;

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Wiborg v. *United States*, 163 U. S. 632, 658, 41 L. Ed. 290, 298, 16 Sup. Ct. 1127, 1197.

5. The case involves a question of the sufficiency of an indictment under the new Federal Rules of Criminal Procedure to charge a violation of Section 2554(a) of Title 26, United States Code, which is a question of Federal law which has not been, but should be, decided by this Court.

6. The decision of the Court of Appeals for the Tenth Circuit in this case, insofar as it refused to reverse the judgment of the District Court because of plain error in the instructions of the court adversely affecting the substantial rights of this petitioner, although such instruction was not excepted to, the liberty of this petitioner being at stake by reason of such error, was in conflict with prior decisions of that court as to the power and duty of an appellate court to reverse the judgment of a trial court in such circumstances.

—*Bogileno* v. *United States*, 38 Fed. (2d) 584;

Strader v. *United States*, 72 Fed. (2d) 589;

Madsen v. *United States*, 165 Fed. (2d) 507.

And was in conflict with other respectable Federal authority.

—*Williams* v. *United States* (C. C. A. 8), 158 Fed. 30, 35, 88 C. C. A. 296;

Meadows v. *United States*, 65 App. D. C. 275, 82 Fed. (2d) 891;

Kinard v. *United States*, 68 App. D. C. 250, 96 Fed. (2d) 522.

III.

STATEMENT OF THE CASE

Reference is made to the statement of the case contained in the petition for writ of certiorari filed herewith and to the facts stated in the opinion of the Court of Appeals, and, in addition thereto, we quote from the record (R. 22) the following portion of the testimony which was given by Government witness, Brown, the paid informer, on cross-examination.

Q. "You talked to Ryles numerous times during the two or three weeks you were here?

A. Yes, sir.

Q. You were with him a good bit?

A. Well, I suspect Cleve and I were together a couple of dozens times, almost every day.

Q. And it was you who insisted on him selling you some dope, wasn't it?

A. Well, yes. I offered to buy some.

Q. He was persuaded by you to sell you some dope, is that right?

A. I don't know whether he was definitely persuaded by me to sell me the dope or not. I want to be fair in answering your question. I did insist on it, yes.

Q. If you hadn't insisted on it he never would have sold you the dope, would he?

A. No, I don't think so.

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Q. He wasn't trying to sell it, was he?

A. Well, I couldn't truthfully answer that question. I don't know. He didn't approach me and ask to sell it to me.

Q. You did that on both occasions that you were able to obtain these articles from him?

A. Well, yes. Yes, I did.

Q. As far as you know this man never would have committed any offense or done anything against the law if it hadn't been for Mr. Hagstrom and you?

Mr. Summers: I object to that (No ruling).

Q. That is right?

A. I presume it as far as I know. I don't know that he would or would not."

(Mr. Hagstrom, a witness for the Government (R. 6), was the Government narcotic agent who had hired Brown.)

At the conclusion of the Government's evidence, the defendant's counsel made a demurrer and motion as follows (R. 27):

> "Comes now the defendant and demurs to the evidence of the Government as to both counts of the indictment, and moves the court to dismiss the charges, for the reason that the evidence shows that if the defendant committed either offense with which he is charged it was by reason of entrapment by the Government agents."

This was overruled and the defendant excepted (R. 27).

The defendant did not introduce any evidence and moved the court to direct a verdict of not guilty as to both counts, and this motion was overruled (R. 27). Thereupon the case was argued to the jury by counsel for both sides (R. 27).

The court, in its instructions to the jury, gave the following instruction in regard to the issue of entrapment (R. 30):

> "The argument has been made to you, and I think I should give you an instruction in regard to that, that it isn't proper to convict a man upon this kind of evidence by reason of the manner in which it was obtained, or that it isn't fair. I believe the attorney used that argument. That is not a problem for the jury to determine. You are not asked whether or not this defendant ought to be convicted under the circumstances in this case, except as it involves the problem of whether or not the evidence that has been permitted to come to you by the court is such as convinces you beyond a reasonable doubt that he did that with which he is charged. If this evidence is not proper to sustain a verdict of guilty that is the court's problem, not a jury problem. I am telling you now there isn't anything in this case that precludes you from returning a verdict of guilty against this defendant by reason of the manner in which they went about obtaining this evidence. The sole question for you is, does the evidence convince you beyond a reasonable doubt that the defendant made the sale to this witness? If it does you should convict him. If that isn't proper, fair or reasonable I have to look after that, not you. You are the fact finders in this case. Did he make the sale or didn't he make the sale? The law is my problem. You assume your responsibility and I will assume mine, and return your verdict accordingly * * * ."

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The evidence showed that the informer, Brown, was actually an agent of the Government (R. 12), that the Government's agents arranged for his release on bond from jail in Tulsa (R. 19), and brought him to Ada, Oklahoma, together with a woman who was not his wife (R. 11), and that he thereafter stayed in a hotel with such woman (R. 11-20), under the surveillance of the Government narcotic agent (R. 11), and that the Government paid him $5.00 a day for his work in ensnaring this defendant (R. 11), which took two or three weeks (R. 25); that Brown was an addict (R. 19), was under a charge in Tulsa of robbery of a doctor of narcotics, on which charge the Government narcotic agents had procured his release on bond (and on which he was serving a sentence in the state penitentiary at the time of the trial) (R. 18), in order for him to operate in this case, and others. Brown's testimony shows that he persuaded Ryles to make the two apparent or alleged sales in this case, and that Ryles would not have done it if it had not been for his persuasion, and would probably not have committed any offense if it had not been for his activities and those of Mr. Hagstrom (R. 22). It can be reasonably inferred from this evidence that petitioner was persuaded and induced by the dope addict, acting as a Government agent, to go procure some morphine for him, in order to relieve his pitiful craving and suffering. It is the petitioner's contention that if the evidence did not conclusively show entrapment, that it did at least raise a jury question which should have been submitted to the jury. The questions presented by the evidence and proceedings at the trial are whether the trial court should have sustained the demurrer to the Government's evidence, which may be considered a motion

for acquittal under Rule 29 of the Federal Rules of Criminal Procedure, and, if not, whether the error of the trial court in misdirecting the jury in regard to the issue of entrapment and deciding the issue against defendant as a matter of law was a plain error affecting the substantial rights of this petitioner, which, under the circumstances in this case, should be noticed under Rule 52(b) of the Federal Rules of Criminal Procedure, although the defendant's counsel failed to specify an exception to the error in the instructions in accordance with Rule 30 of the Federal Rules of Criminal Procedure.

IV.

SPECIFICATIONS OF ERROR

1. The Court of Appeals erred in holding that the error of the trial court in not submitting the issue of entrapment to the jury, and in instructing the jury, as a matter of law, that there was no entrapment in the case was not a plain error for which the judgment of the trial court should be reversed.

2. The Court of Appeals erred in not reversing the judgment of the trial court because of the error of the trial court in misdirecting the jury on the law of the case and in deciding the issue of entrapment against petitioner as a matter of law, when it should have been submitted to the jury as a question of fact.

3. The Court of Appeals erred in holding that the indictment under which petitioner was convicted was sufficient to charge a violation of the statute (26 U. S. C., Sec. 2554 [a]).

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4. The Court of Appeals erred in not reversing the judgment of the District Court with directions to grant petitioner, the defendant in the District Court, a new trial.

5. The Court of Appeals erred in not holding that the defendant's demurrer to the Government's evidence or motion for acquittal should have been sustained by the District Court.

6. The Court of Appeals erred in denying petitioner's petition for rehearing in that court.

V.

ARGUMENT

First Proposition

The Court of Appeals erred in holding that the error of the trial court in not submitting the issue of entrapment to the jury and in instructing the jury as a matter of law that there was no entrapment in the case was not a plain error for which the judgment of the trial court should be reversed, and erred in not reversing the judgment of the trial court because of the error of the trial court in misdirecting the jury on the law of the case, and in deciding the issue of entrapment against the petitioner as a matter of law, when it should have been submitted to the jury as a question of fact.

This proposition combines Specifications of Error numbered 1, 2, and 4.

If the defendant (petitioner here), was persuaded and induced by the dope addict, Brown, acting as a Government agent, to go procure some morphine for him, and was thereby entrapped, then it is not just that the de-

fendant serve three years on these charges without at least being given the right of having a jury pass on this issue, as such facts do constitute entrapment.

—*Wall* v. *United States* (C. C. A. Fla.), 65 Fed. (2d) 993;

Hunter v. *United States* (C. C. A. Tex.), 62 Fed. (2d) 217;

DiSalvo v. *United States*, 2 Fed. (2d) 222;

Butts v. *United States* (C. C. A. 8), 273 Fed. 35, 18 A. L. R. 143;

Sorrells v. *United States*, 287 U. S. 435, 77 L. Ed. 413, 53 Sup. Ct. 210, 86 A. L. R. 249.

The opinion of the Court of Appeals in this case apparently finds that there was sufficient evidence of entrapment to raise a question for the jury.

The following has been held:

> "It is never permissible for the Government through its officers and agents to initiate the criminal act, nor to entice or induce a defendant to commit a crime, when, without such enticement, or inducement, the defendant would not have committed such crime. A defendant cannot be convicted of a crime which was provoked or induced by a Government agent or officer and which would not otherwise have been committed." (*DiSalvo* v. *U. S.*, 2 Fed. [2d] 222).

The conclusion is apparently reached in the opinion of the Court of Appeals that the trial court did err in giving the instruction to the jury regarding entrapment above quoted and which appears at page 30 of the printed record, but the opinion apparently assumes that although Rule 30 of the Federal Rules of Criminal Procedure is

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qualified by Rule 52(b) and the two rules are to be construed in *para materia* and do not effect any change in the proper previous decisional rule, yet, that such an error in instructions, as involved here, when not excepted to, in order to be reversible, must be not only a plain error, but one which appears to the Court of Appeals to have resulted in a miscarriage of justice. We have not found where the Court of Appeals for the Tenth Circuit ever previously (prior to the adoption of the Federal Rules of Criminal Procedure), applied such a strict and rigid rule to an attempted attack on an error in an instruction, not excepted to, in a criminal case where the liberty of the complaining party was at stake. The opinion, in this respect, is in conflict with the opinion of that court in the case of *Bogileno* v. *United States*, 38 Fed. (2d) 584, wherein it was held:

> "Where liberty of complaining party is at stake, and court has clearly misdirected jury in discharge of its functions, general rule that appellate court will not consider alleged errors not called to attention of trial court will not be followed, but claimed error *will* be considered notwithstanding charge was not excepted to at time."

In that case the appellant had been sentenced to confinement in the penitentiary for a term of three years, the same as the sentence in this case. The instruction of which petitioner complains in this case appears clearly to be more prejudicial and fundamentally wrong than the instruction considered by the Circuit Court of Appeals for the Tenth Circuit, without exceptions having been made thereto, in the case of *Strader* v. *United States*, 72 Fed. (2d) 589.

It had been held by the Circuit Court of Appeals for the Sixth Circuit [*Marin* v. *United States* (C. C. A. Mich. 1926), 10 Fed. (2d) 271], that alleged errors in the charge of the court to a jury in a criminal case, to which no exceptions were taken, would not be considered on appeal in that court unless it appeared to that court that there had been a miscarriage of justice, but, we submit, this Court had never applied so harsh or rigid a rule against a defendant in a criminal case who sought to obtain a reversal of a judgment and sentence against him because of a plain error in the instructions to the jury, clearly prejudicial to him, such as is presented in the case at bar, and neither had the Circuit Court of Appeals for the Tenth Circuit, prior to the adoption of the new Federal Rules of Criminal Procedure, which the opinion of the Court of Appeals for the Tenth Circuit in this case admits did not change the proper previous decisional rule.

This Court said, in its opinion in the case of *Screws* v. *United States*, 325 U. S. 91, 107, *supra*, a case where no exception was taken to the trial court's charge, that

> " * * * where the error is so fundamental as not to submit to the jury the essential ingredients of the only defense on which the conviction could rest, we think it is necessary to take note of it on our own motion."

We contend that the error in the instructions in this case in the court depriving the defendant of his defense of entrapment was equally as fundamental.

The "plain error" doctrine (which is restated in Rule 52(b) of the Federal Rules of Criminal Procedure), as applied to instructions, was stated by the United States

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Court of Appeals for the District of Columbia in the case of *Meadows* v. *United States*, 82 Fed. (2d) 881, at page 884, as follows:

> " * * * it is well settled that if a plain error vital to a defendant has been committed, there is power, notwithstanding absence of objection and exception, to notice and correct it on appeal. *Wiborg* v. *United States*, 163 U. S. 632, 658, 16 S. Ct. 1127, 41 L. Ed. 289; *Crawford* v. *United States*, 212 U. S. 183, 194, 29 S. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; *Mahler* v. *Eby*, 264 U. S. 32, 45, 44 S. Ct. 283, 68 L. Ed. 549; *Brasfield* v. *United States*, 272 U. S. 448, 450, 47 S. Ct. 135, 71 L. Ed. 345. Rule 8 of the Revised Rules of the Supreme Court of the United States (286 U. S. 593, 598, 28 U. S. C. A. following section 354) and Rule IX of the Rules of Practice and Procedure * * * in Criminal Cases * * * , promulgated by the Supreme Court of the United States (292 U. S. 661, 664, 28 U. S. C. A. following section 723a) do not in our view affect this power."

The Circuit Court of Appeals for the Eighth Circuit in the case of *Williams* v. *United States*, 158 Fed. 30, *supra*, at page 35, made a similar statement to the effect that in a criminal case where a plain error is committed in a matter vital to the defendant especially in case where the defendant has been sentenced to confinement, it is the province of the Appellate Court to correct it, citing the cases of:

> —*Wiborg* v. *United States*, 163 U. S. 633, 656, 16 Sup. Ct. 1127, 41 L. Ed. 289, and
>
> *Clyatt* v. *United States*, 197 U. S. 207, 221, 222, 25 Sup. Ct. 429, 49 L. Ed. 726.

And the opinion of the Court of Appeals for the Tenth Circuit in this case is in this respect, it is submitted, actually in conflict with the decision of this Court in the case of *United Brotherhood of Carpenters & Joiners of America* v. *United States*, 330 U. S. 395, 412, *supra*, cited in the opinion of the Court of Appeals. There was no question about the defendant's counsel actually contending to the trial court that the defendant had been entrapped and the purpose of Rule 30 is for the trial court to be informed of any error or omission in instructions so that it may be promptly corrected [*United States* v. *Wilson* (C. C. A. 2), 154 Fed. (2d) 802], and so it is clear from the record in this case that any reason for Rule 30 being given full application is not present in this case.

Second Proposition

The Court of Appeals erred in denying Petitioner's Petition for Rehearing.

(Specification of Error No. 6)

The grounds for the petition for rehearing are shown in the record (R. 39). In his petition for rehearing in that court the petitioner made the same contentions as are presented under the first proposition of the argument in this brief.

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Third Proposition

The Court of Appeals erred in holding that the indictment was sufficient.

(Specification of Error No. 3)

Each count of the indictment charged that the alleged sale was "not in pursuance of a written order of the said Darrell Herbert Brown upon a form prescribed and furnished by the *Collector* of Internal Revenue * * * ." Sec. 2554(a) of Title 26, United States Code, makes unlawful any sale of certain drugs "except in pursuance of a written order of a person to whom such article is sold, * * * on a form to be issued in blank for that purpose by the Secretary." It has been held that the Secretary of the Interior has delegated to the Commissioner of Internal Revenue (not Collector of Internal Revenue) the power to issue the blank order forms.

—*Nailling* v. *United States*, 142 Fed. (2d) 551;
Cromer v. *United States*, 142 Fed. (2d) 697.

It was necessary for the statutory exception to be negatived in the indictment.

—*Sutton* v. *United States*, 157 Fed. (2d) 661.

The failure of the indictment to charge an offense may be noticed at any time during the pendency of the proceeding under Rule 12(b)(2) of the Federal Rules of Criminal Procedure.

Fourth Proposition

The Court of Appeals erred in not holding that the Demurrer to the Government's evidence should have been sustained.

(Specification of Error No. 5)

The petitioner contends that Government's own witnesses testified the facts showing that the defendant was entrapped (R. 22), and thereby destroyed the Government's case.

CONCLUSION

It is respectfully submitted that the questions involved in this case are such as to justify this Court in granting a writ of certiorari to the United States Court of Appeals for the Tenth Circuit, in order that its opinion and decision may be reviewed, and that this Court should review the decision of the Court of Appeals for the Tenth Circuit in this case and reverse it.

Respectfully submitted,

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Counsel for Petitioner.

Of Counsel:

TURNER M. KING,
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APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT.

No. 3711—November Term, 1948.

Oliver Cleve Ryles,
Appellant,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the Eastern District of Oklahoma.

[December 29, 1948.]

Carloss Wadlington (Turner M. King was with him on the brief) for Appellant.

Paul Gotcher, Assistant United States Attorney (Cleon A. Summers, United States Attorney was with him on the brief) for Appellee.

Before BRATTON, HUXMAN and MURRAH, Circuit Judges.

MURRAH, Circuit Judge, delivered the opinion of the court.

Appellant was indicted in the United States District Court for the Eastern District of Oklahoma on two counts charging illegal sales of narcotics in violation of 26 USCA 2554(a). Upon trial of the case and at the conclusion of the Government's evidence, the defendant moved for a directed verdict of acquittal on the ground of entrapment. The motion was denied, defendant offered no evidence, and the case was submitted to the jury. The court specifically instructed the jury that the question of entrapment was one of law for the court, and limited their deliberation on the defendant's guilt or innocence to alleged sales. Upon a verdict of guilty, a sentence of three years on each count, to run concurrently, was imposed and the defendant has appealed.

The first ground urged on appeal is that the indictment failed to charge an offense under Section 26 USCA

2554(a). Each count of the indictment alleges that the sales of narcotics was not made in pursuance of a written order upon a form "prescribed and furnished by the Collector of Internal Revenue." The statute condemns all sales of narcotics, except those made in pursuance of a written order on a form "issued in blank for that purpose by the Secretary." While not disputing the power of the Collector of Internal Revenue to act for the Secretary of Treasury, in the issuance of the prescribed forms, the appellant contends that the use of the words "prescribed and furnished" in the allegations of the indictment are not the legal equivalent of the word "issued," used in the statute, and the indictment is therefore at fatal variance with the statute. The indictment stated the substance of the offense and sufficiently apprised the appellant of the nature of the charge against him to permit him to prepare his defense, and it is therefore not defective. See *Hagner* v. *United States*, 285 U. S. 427; *Berger* v. *United States*, 295 U. S. 78; *Denny* v. *United States*, 151 F. 2d 828; *United States* v. *Angelo*, 153 F. 2d 247.

It is next contended that the Government's evidence conclusively establishes entrapment, and the trial court therefore erred in denying the motion for a directed verdict of acquittal. In the alternative appellant says that if entrapment is not conclusively shown, it then became a question of fact for the jury, and the trial court erred in instructing that it was a question of law for the court.

The Government's evidence established the following facts: In the early part of August 1947, a Federal Narcotic Agent arrived in Ada, Oklahoma, with an informer by the name of Darrell Brown, for the purpose of investigating narcotic sales. Brown contacted the appellant, whose name was on a list of suspects, furnished by the Government agent, and during a period of two or three weeks was with him "almost every day." On August 18, the Government agent searched Brown for narcotics, gave him $7.00, ob-

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served him meet the appellant and return with a purchase of opium. On August 20, under similar circumstances, Brown again contacted the appellant and made a purchase of morphine.

It is well settled that a Government agent may use "decoys" in apprehending law violators, and may offer an opportunity to one who is intending or willing to commit a crime. But, the law will not countenance decoys for the purpose of luring or inducing the innocent or law abiding into the commission of crime. *Sorrels* v. *United States*, 287 U. S. 435; *Butts* v. *United States*, 273 F. 35; *Fiunkin* v. *United States*, 265 F. 1; *Di Salvo* v. *United States*, 2 F. 2d 222; *Vamus* v. *United States*, 13 F. 2d 347; *Polski* v. *United States*, 33 F. 686; *Cratty* v. *United States*, 163 F. 2d 844.

We cannot say as a matter of law from the Government's evidence, that the Government agent enticed or induced the appellant to make the sales of narcotics for which he was convicted and sentenced. At most, it presented a question for the jury under proper instructions on the law of entrapment.

Appellant, represented by competent counsel, did not request any instructions on the law of entrapment. When the trial court failed to so instruct, he neither objected nor suggested any further instructions.

Rule 30 of the Federal Rules of Criminal Procedure, 18 USCA following Section 687, provides for the timely filing of written requests for instructions to the jury, and further provides that "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection."

The rule is but a restatement of decisional law. *Screws* v. *United States*, 325 U. S. 91, 107; *Johnson* v. *United States*,

318 U. S. 189; *United States* v. *Atkinson*, 297 U. S. 157, 159. The decisional rule was subject however, to the qualification that where the error amounted to a denial of fundamental rights the appellate court would notice it upon its own motion. *Screws* v. *United States, supra; Johnson* v. *United States, supra; United States* v. *Atkinson, supra; Miller* v. *United States*, 120 F. 2d 968. Although Rule 30 does not by its terms provide or recognize any exceptions, companion Rule 52b does recognize and restate the decisional exception by providing that "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." See Notes of Advisory Committee on Rules, following Rule 52, 18 USCA following Section 687. The two rules have been construed in *para materia* as preserving the decisional rule. See *Cave* v. *United States*, 159 F. 2d 464, 469; *United States* v. *Monroe*, 164 F. 2d 471, 474; *United States* v. *Perplies*, 165 F. 2d 874. Without adverting to Rule 30, the Supreme Court has recently cited Rule 52b as authority for taking notice of "plain error" in the trial court's instructions, although not assigned or specified. See *United Brotherhood of Carpenters and Joiners of America* v. *United States*, 330 U. S. 395, 412. In our previous consideration of Rule 30 we failed to take into account the modifying effect of Rule 52b. See *Berenbeim* v. *United States*, 164 F. 2d 679; *Bartlett* v. *United States*, 166 F. 2d 920; *Thayer* v. *United States*, 168 F. 2d 247. But, see *Madsen* v. *United States*, 165 F. 2d 507.

Conceding Rule 30, with its qualification, and conceding that the Government's evidence is susceptible to an inference of entrapment justifying submission of that issue to the jury, we are yet unable to say in these circumstances that failure to do so was plain error, resulting in a miscarriage of justice.

Appellant's contention that the evidence is insufficient to support the jury's verdict is wholly without merit.

The judgment is affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 593

OLIVER CLEVE RYLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 35-38) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered December 29, 1948 (R. 38-39), and a petition for rehearing (R. 39-40) was denied January 27, 1949 (R. 40). The petition for a writ of certiorari was filed February 24, 1949. The jurisdiction of

this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

Petitioner was indicted for illegal sales of narcotics. The evidence showed that the sales were made to an informer acting under the direction of a government agent. On cross-examination of the informer, defense counsel drew an admission that the sales probably would not have been made but for the informer's insistence. Petitioner did not take the stand and offered no evidence in his own defense.

The principal question presented is whether the trial court committed reversible error (a) in denying petitioner's motion for acquittal on the ground that the evidence showed that he had been entrapped by government agents, and (b) in charging the jury that, in determining the issue of petitioner's guilt or innocence, they should not consider the evidence bearing upon the alleged entrapment.

A subsidiary question is whether the indictment sufficiently charged an offense under the statute.

STATUTE AND RULES INVOLVED

Section 2 of the Harrison Narcotic Act, as amended (sec. 2554 of the Internal Revenue Code; 26 U. S. C. 2554), provides in pertinent part:

> (a) *General requirement.* It shall be unlawful for any person to sell * * * [any opium

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derivative] except in pursuance of a written order of the person to whom such article is sold, * * * on a form to be issued in blank for that purpose by the Secretary.

* * * * *

(f) *Supply.* The Secretary shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors for sale by them * * *.

Rule 30 of the Federal Rules of Criminal Procedure provides in pertinent part:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *

Rule 52(b) of the Federal Rules of Criminal Procedure provides:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

A two-count indictment was filed against petitioner in the District Court for the Eastern District

of Oklahoma charging that on two separate occasions he executed sales of opium derivatives to one Darrell Brown, not in pursuance of a written order "on a form prescribed and furnished by the Collector of Internal Revenue," in violation of Section 2 of the Harrison Narcotic Act (R. 1-2). After a jury trial, he was convicted on both counts (R. 2) and was sentenced to imprisonment for three years on each, the sentences to run concurrently (R. 4-5). The judgment was affirmed by the Court of Appeals for the Tenth Circuit (R. 38-39).

The first witness at the trial was Theodore Hagstrom, a federal narcotic agent, who began his testimony by stating that he knew Darrell Brown, that he knew petitioner, and that he made an investigation of opium sales by petitioner in Ada, Oklahoma, in August 1947 (R. 6-7, 8). The following then occurred (R. 7):

> Q. What preparation did you make in connection with these sales?
>
> Mr. Wadlington [Defense Counsel]: If the court please, we will object to that. It is not shown this defendant will be connected.
>
> The Court: Overruled.
>
> A. Information was received from the Chief of Police——
>
> The Court: Don't tell what your information was.
>
> A. We secured the services of Informer Brown and on August 18th he advised me——
>
> Mr. Wadlington: If the court please, we object to proving the case that way.

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The Court: Leave out the hearsay. You know the difference between hearsay and other evidence.

The witness then testified that on August 18 and August 20, 1947, he searched Brown, gave him money, and then observed him purchase narcotics from petitioner (R. 7-10). In neither instance did Brown have a proper order form (R. 11). On cross-examination, Hagstrom admitted that Brown was an addict and that he was paid living expenses by the Government while acting as an informer in narcotics cases (R. 11-12, 15). On redirect examination the following occurred (R. 15):

Q. Why did you employ an addict to assist you in making this investigation?

Mr. Wadlington: We object to that, your honor.

The Court: I will let you argue that.

Apparently the objection was sustained after argument, for the prosecutor abandoned that line of questioning.

Brown, the informer, then took the stand as a witness for the Government and testified as to the two purchases he had made from petitioner (R. 16-18). On cross-examination, Brown stated that just prior to the investigation of petitioner, he had been in jail in Tulsa, Oklahoma, on a robbery charge involving a taking of narcotics; that the federal agents secured his release on bond so that he could assist them in the Ada investigation; that

he was later convicted and sentenced to 10 years' imprisonment on the robbery charge and was presently serving that term; and that agent Hagstrom brought him to Ada and directed him to try to get evidence against petitioner (R. 18-21). The following then occurred (R. 22):

> Q. You talked to Ryles numerous times during the two or three weeks you were here?—A. Yes, sir.
>
> Q. You were with him a good bit?—A. Well, I suspect Cleve and I were together a couple of dozens times, almost every day.
>
> Q. And it was you who insisted on him selling you some dope, wasn't it?—A. Well, yes. I offered to buy some.
>
> Q. He was persuaded by you to sell you some dope, is that right?—A. I don't know whether he was definitely persuaded by me to sell me the dope or not. I want to be fair in answering your question. I did insist on it, yes.
>
> Q. If you hadn't insisted on it he never would have sold you the dope, would he?—A. No, I don't think so.
>
> Q. He wasn't trying to sell it, was he?—A. Well, I couldn't truthfully answer that question. I don't know. He didn't approach me and ask to sell it to me.
>
> Q. You did that on both occasions that you were able to obtain these articles from him?—A. Well, yes. Yes I did.

Q. As far as you know this man never would have committed any offense or done anything against the law if it hadn't been for Mr. Hagstrom and you?

Mr. Summers [United States Attorney]: I object to that.

Q. That is right?—A. I presume it as far as I know. I don't know that he would or would not.

On redirect examination, Brown stated that agent Hagstrom had given him the names of certain people, including petitioner, who were suspected of selling narcotics in Ada, but further questioning along this line was again cut short by a defense objection (R. 22-23).

The testimony as to the sales by petitioner was further corroborated by the Chief of Police of Ada and by a Government chemist (R. 23-26).

Petitioner did not take the stand, nor did he present any other evidence in his own defense. Instead, defense counsel moved at the close of the Government's case that the charges be dismissed and that a verdict of not guilty be directed on the ground that the evidence showed that petitioner had been entrapped by the government agents. The motions were denied. (R. 27.)

The court instructed the jury on the presumption of innocence, reasonable doubt, the credibility of the witnesses, and the weight to be given their testimony (R. 28-29, 30-31). The court further

instructed the jury that they were not to consider the propriety of the methods used to secure the evidence against petitioner (R. 30):

> The argument has been made to you, and I think I should give you an instruction in regard to that, that it isn't proper to convict a man upon this kind of evidence by reason of the manner in which it was obtained, or that it isn't fair. I believe the attorney used that argument. That is not a problem for the jury to determine. You are not asked whether or not this defendant ought to be convicted under the circumstances in this case, except as it involves the problem of whether or not the evidence that has been permitted to come to you by the court is such as convinces you beyond a reasonable doubt that he did that with which he is charged. If this evidence is not proper to sustain a verdict of guilty that is the court's problem, not a jury problem. I am telling you now there isn't anything in this case that precludes you from returning a verdict of guilty against this defendant by reason of the manner in which they went about obtaining this evidence. The sole question for you is, does the evidence convince you beyond a reasonable doubt that the defendant made the sale to this witness? If it does you should convict him. If that isn't proper, fair or reasonable I have to look after that, not you. You are the fact finders in this case. Did he make the sale or didn't he make the sale? The law is my problem. You assume your responsibility and I

will assume mine, and return your verdict accordingly.

What I have just told you does not detract at all from your right to determine the weight and credibility of the witnesses. What I am telling you, it is not the function of the jury to determine the problem of using this kind of testimony.

There is nothing in the record to indicate that defense counsel requested an instruction on entrapment, and when, at the conclusion of the charge, the court asked, "Anything I have overlooked?" (R. 31) defense counsel raised no objection. Not until the filing of a motion for new trial, five days after verdict, was objection made to the court's failure to instruct the jury on entrapment (R. 3).

DISCUSSION

It is clear that the affirmative defense of entrapment is available to a defendant in a criminal case where he can show that the criminal design originated not with himself but with the government officers, and that, although he was of an innocent predisposition, the officers instigated, persuaded, or otherwise induced him to commit the crime. *Sorrells* v. *United States,* 287 U. S. 435, 441-452, and authorities cited. It is also clear that, in order to require the trial court to submit the issue of entrapment to the jury, the defendant must meet the affirmative burden of presenting substantial evidence from which the

jury could find the necessary elements of entrapment. *Flynn* v. *United States*, 57 F. 2d 1044, 1046 (C.A. 8), certiorari denied, 287 U.S. 627; *Polski* v. *United States*, 33 F. 2d 686 (C.A. 8), certiorari denied, 280 U.S. 591; *Corcoran* v. *United States*, 19 F. 2d 901 (C.A. 8); *Vamvas* v. *United States*, 13 F. 2d 347 (C.A. 5); *Scriber* v. *United States*, 4 F. 2d 97 (C.A. 6); cf. *Davis* v. *United States*, 160 U.S. 469; *Holloway* v. *United States*, 148 F. 2d 665, 666 (C.A. D.C.).

Petitioner makes two alternative contentions with respect to the issue of entrapment. He contends, first, that the testimony given by the informer, Brown, conclusively established entrapment by the government agents, and that the trial court should have granted a judgment of acquittal. We believe this contention cannot succeed. Brown admitted that he had "insisted" that petitioner sell him some narcotics, and he stated that he did not think the sales would have been made to him without such insistence. But he also testified that petitioner was suspected of being in the business of selling narcotics illegally. (R. 22-23.) Consequently, Brown's testimony cannot be regarded as so conclusive on the issue of entrapment as to have required the trial court to enter a judgment of acquittal.

Petitioner's second contention is that the evidence was such that the trial court should at least have instructed the jury on entrapment, and that

its failure to do so constituted such plain error as to require reversal, despite the fact that no such instruction was requested and no objection was made to the charge as given. The Court of Appeals agreed that under Rule 52, F. R. Crim. P. (*supra,* p. 3), an error in the charge, even though not objected to, may require a new trial if the defendant's substantial rights have been affected. But the court went on to say: "conceding that the Government's evidence is susceptible to an inference of entrapment justifying submission of that issue to the jury, we are yet unable to say in these circumstances that failure to do so was plain error, resulting in a miscarriage of justice" (R. 38).

As has been pointed out, "the defense of entrapment is not simply that the particular act was committed at the instance of government officials. * * * The predisposition and criminal design of the defendant are relevant." *Sorrells* v. *United States, supra,* at 451. In order to require submission of an issue of entrapment to the jury, there must be substantial evidence that the defendant's predisposition was that of an innocent man, some proof that the criminal intent was implanted in his mind by the government officers, and not merely that the criminal act was the result of the affirmative action of government agents. Concededly, Brown's testimony would have supported a finding that petitioner sold the narcotics to Brown at

the instance of the government officers. However, petitioner offered no evidence of innocent predisposition. The Court's opinion in the *Sorrells* case states that the "controlling question" is "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials", and that "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." (287 U. S. at 451.)

If the defendant in this case had come forward with evidence as to the innocence of his predisposition, thus squarely seeking to establish the defense of entrapment, the prosecution would have been put clearly on notice that it should meet this issue by cross-examination and through rebuttal. In addition, defense counsel effectively blocked every opportunity of the prosecution to show that, prior to the sales to Brown, the agents had information upon which to base a reasonable belief that petitioner was actively engaged in peddling narcotics (*supra,* pp. 4-7). In these circumstances, it is questionable whether petitioner could "take the contradictory attitude of claiming that [there was] evidence in support of that issue [entrapment] and at the same time insist that the prosecution be denied the right to introduce evidence to defeat

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it." *Corcoran* v. *United States,* 19 F. 2d 901, 903 (C. A. 8).

However, upon consideration of all the circumstances of this case, the Government has doubts as to whether the issue of entrapment was sufficiently canvassed at the trial. We believe that the interests of justice would be served by permitting this case to be re-tried in order to give the court and the parties an opportunity to explore the issue of entrapment fully and have all the relevant evidence presented. The record in its present posture does not contain an adequate evidentiary basis upon which the issue of entrapment should be considered and decided.

Accordingly, the Government consents that the judgment of the Court of Appeals should be vacated forthwith, without further briefs or argument, and the cause be remanded to the District Court for a new trial.[1]

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.

APRIL 1949.

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[1] Petitioner also contends that the indictment failed to allege an offense under the statute. The statute punishes all sales of opium derivatives except in pursuance of an order on a form issued by the Secretary of the Treasury (26 U. S. C. 2554, *supra,* pp. 2-3). The Secretary has delegated the power

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to issue such forms to the Commissioner of Internal Revenue. *Nailling* v. *United States*, 142 F. 2d 551 (C. A. 6), certiorari denied, 316 U. S. 675. The present indictment alleged that sales had been made by petitioner not in pursuance of an order on a form "prescribed and furnished by the Collector of Internal Revenue" (*supra*, p. 4). Petitioner argues that no offense was stated because the indictment named the "Collector" instead of the "Commissioner." The statute, however, specifically provides that the forms shall be furnished to prospective purchasers by the various collectors (26 U. S. C. 2554(f), *supra*, p. 3). We think there is no possibility that petitioner was misled or handicapped in preparing his defense by this description of the crime, nor is there any possibility that he could be subjected to another prosecution for the same offense. *Kinnison* v. *United States*, 158 F. 2d 403 (C.A. D.C.), certiorari denied, 330 U. S. 834; *Cromer* v. *United States*, 142 F. 2d 697, 698 (C.A. D.C.), certiorari denied, 322 U. S. 760; *Nailling* v. *United States*, 124 F. 2d 431, 142 F. 2d 551 (C.A. 6), certiorari denied, 316 U. S. 675.

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No. 593. RYLES *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. Upon the suggestion of the Solicitor General that the judgments be vacated and the case remanded to the District Court for a new trial, and upon consideration of the record, the judgments of the Court of Appeals and the District Court are vacated and the case is remanded to the United States District Court for the Eastern District of Oklahoma with directions to grant a new trial. *James W. Bounds* for petitioner. *Solicitor General Perlman* and *Assistant Attorney General Campbell* for the United States. Reported below: 172 F. 2d 72.